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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. [redacted] 31

DR. FURMAN ANGEL,

Petitioner,

vs.

W. H. BULLINGTON,

Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE PETITIONER

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INDEX

Subject Index

	Page
Opinions below	1
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement of the case	2
Specification of errors to be urged	3
Summary of argument	4
Argument	4
Appendix	15

Table of Cases Cited

Atcheson T. & S. F. R. Co. v. *United States*, 284 U. S. 248, 76 L. Ed. 273	5
Broderick v. *Rosner*, 294 U. S. 629, 79 L. Ed. 1100	9
David Lupton Sons Co. v. *Automobile Club*, 225 U. S. 489, 32 Sup. Ct. 711, 56 L. Ed. 1177	11, 12
East New York Savings Bank v. *Hahn*, Supreme Court Law Edition Advance Opinions, Vol. 90, P. 9	8
Erie Railway v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188	9, 13
Guaranty Trust Co. v. *York*, 89 L. Ed. 1418	9, 13
Home Building & Loan Association v. *Blaisdell*, 290 U. S. 398, 78 L. Ed. 413, 88 A. L. R. 1481, 189 Minn. 422, 249 N. W. 334, 86 A. L. R. 1507	5, 6
Kennedy v. *Supreme Lodge*, 252 U. S. 411, 64 L. Ed. 638	9
Marcus Brown Holding Co. v. *Feldman*, 256 U. S. 170, 198, 65 L. Ed. 877, 888, 41 S. Ct. 465	8
Manigault v. *Springs*, 199 U. S. 473, 50 L. Ed. 274, 26 S. Ct. 127	8
McKnett v. *St. L. & S. F. Ry. Co.*, 292 U. S. 230, 78 L. Ed. 1227	9

Page

Page v. *Ford*, 65 Oregon 450, 45 L. R. A. (N. S.) 11
Newark Savings Inst. v. *Furman*, 33 N. J. Equity 436 247, 131 Pac. 1013 11
Parker Brothers v. *Fagan*, 68 Fed. (2d) 616 11
Railway Co. v. *Whettan*, 13 Wallace 270, 20 L. Ed. 571 11, 12
Rooker v. *Fidelity Trust Co.*, 263 U. S. 413, 68 L. Ed. 362 10
Stephenson v. *Binford*, 287 U. S. 251, 276, 77 L. Ed. 288, 301, 53 S. Ct. 181, 87 A. L. R. 721 7
Suydan v. *Broadnax*, 14 Pet. 67, 10 L. Ed. 357 11
Tennessee v. *Sneed*, 96 U. S. 69, 24 L. Ed. 610 11
Union Bank v. *Vaiden*, 18 Howard 506, 15 L. Ed. 472 11, 12

STATUTES

Chapter 36, Public Laws of North Carolina 1933, G. S. North Carolina, 1943, Sec. 45-36 2

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BRIEF FOR THE PETITIONER

Opinions Below

The opinion of the District Court (R. 15) is not printed in the published reports.

The opinion of the Circuit Court of Appeals (R. 20) is reported in 150 Federal (2) 679.

Jurisdiction

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on July 19, 1945 (R. 24). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925. 28 U. S. C. A. 347.

Questions Presented

1. Can respondent, who has taken a deed of trust to secure deferred purchase money payments, after having caused the property to be sold under the terms of the deed of trust, obtain in the Federal Court a deficiency judgment in the face of a State Statute refusing to permit deficiency judgments in all sales of real property by mortgagees or trustees under the power of sale contained in a purchase money mortgage or deed of trust executed after the enactment of the Statute?

2. Having prosecuted an action to obtain a deficiency judgment in a court of competent jurisdiction in the State of North Carolina, and the State Court of last resort upon appeal having adjudged that the State Court, by reason of the State Statute, was without jurisdiction to entertain the action, could respondent then maintain an action in the Federal Court for said purposes, or was he estopped by the judgment of the State Court?

Statute Involved

The Appendix Infra (p. 15), contains the applicable Statute, Chapter 36, Public Laws of North Carolina 1933, G. S. of North Carolina 1943, Section 45-36.

Statement of the Case

There are no controverted issues of fact in this case. The parties entered into a stipulation agreeing upon the facts (R. 10). The facts were that petitioner purchased some real

estate in Roanoke, Virginia, paying a part of the purchase price and executing purchase money notes secured by deed of trust for the deferred payments. Only one payment was made, the initial payment. When default was made in the payment of the first note the property was foreclosed under the deed of trust, and respondent purchased it, subject to certain outstanding indebtedness, for the sum of $25.00. He prosecuted an action in the State Court in North Carolina for deficiency judgment. The State Court denied recovery on the ground that the State Statute prohibiting deficiency judgments (R. 21) took from it jurisdiction of the case, and the right to entertain the action. Respondent then instituted the present action, which was heard upon an agreed statement of facts, and recovery was allowed. The judgment of the lower court was affirmed by the Circuit Court of Appeals.

Petitioner takes the position that the Statute is not invalid for that (a) a remedy was left to respondent whereby he could have instituted suit on his notes before foreclosure; (b) that regardless of whether a remedy was left, the Act was effectual and applied to the Federal Court; and (c) since respondent had elected to institute his action first in the State Court, and a judgment by the highest Court in the State was entered, adjudging that the State Court had no jurisdiction to entertain the action, and respondent took no appeal or other appropriate action to have the judgment reviewed by this Court, that the judgment constituted *res judicata* and respondent was, therefore, estopped to maintain this action.

Specification of Errors to Be Urged

The Court below erred:

1. In holding that respondent was entitled to maintain his action in the Federal District Court in the face of the North Carolina Statute establishing it to be the public

policy of the State that deficiency judgments could not be granted on purchase money notes executed and secured by mortgage or deed of trust on the property, after default, and after the property had been sold under the mortgage or deed of trust.

2. In failing to hold that respondent was estopped by the North Carolina action from prosecuting this action in the Federal Court.

Summary of Argument

I

The North Carolina Statute enacted in 1933, abolishing deficiency judgments where mortgage represents part of purchase price, is valid as coming within the police power of the State.

II

Respondent having instituted action in the State Court of North Carolina asking for the same relief as here demanded, and an unappealed adjudication having been made by the highest court of the State to the effect that the statute is valid, he is hereby precluded from maintaining this action in the Federal Court.

ARGUMENT

I

The Statute Is Valid

The State of North Carolina in 1933 enacted the Statute in question for the purpose of establishing the public policy of the State with regard to deficiency judgments.

Respondent takes the position that this statute is invalid as being repugnant to the Contract Clause of the Constitu-

tion of the United States, Article 1, Section 10. Petitioner insists that it is valid as coming within the police powers of the State.

It was universally known at the time of the enactment of the statute in question that there was a nation-wide business and financial crisis. The Courts will take judicial notice of such fact.

Atcheson T. & S. F. R. Co. v. *United States*, 284 U. S. 248; 76 L. Ed. 273.

In the case of *Home Building and Loan Association* v. *Blaisdell*, 189 Minn. 422; 249 N. W. 334, 86 A. L. R. 1507, involving the validity of a Mortgage Moratorium Statute, which we submit is the same in principle as the question here involved, the Court said:

> "In addition to the weight to be given the determination of the legislature that an economic emergency exists which demands relief, the Court must take notice of other considerations. The members of the legislature come from every community of the State and from all walks of life. They are familiar with conditions generally in every calling, occupation, profession and business in the state. Not only they, but the courts must be guided by what is common knowledge. It is common knowledge that in the last few years land values have shrunk enormously. Loans made a few years ago upon the basis of the then going values cannot possibly be replaced on the basis of present values. We all know that when this law was enacted the large financial companies, which had made it their business to invest in mortgages, had ceased to do so. No bank would directly or indirectly loan on real estate mortgages. Life insurance companies, large investors in such mortgages, had even declared a moratorium as to the loan provisions of their policy contracts. The President had closed banks temporarily. The Congress, in addition to many extraordinary measures looking to

the relief of the economic emergency, had passed an act to supply funds whereby mortgagors may be able within a reasonable time to refinance their mortgages or redeem from sales where the redemption has not expired. With this knowledge the court cannot well hold that the legislature had no basis in fact for the conclusion that an economic emergency existed which called for the exercise of the police power to grant relief."

Another Justice of the same Court, in a concurring opinion, added the following:

"The present nation wide and world wide business and financial crisis has the same results as if it were caused by flood, earthquake, or disturbance in nature. It has deprived millions of persons in this nation of their employment and means of earning a living for themselves and their families; it has destroyed the value of and the income from all property on which thousands of people depended for a living; it actually has resulted in the loss of their homes by a number of our people and threatens to result in the loss of their homes by many other people in this state; it has resulted in such widespread want and suffering among our people that private, state and municipal agencies are unable to adequately relieve the want and suffering and congress has found it necessary to step in and attempt to remedy the situation by federal aid. Millions of the people's money were and are yet tied up in closed banks and in business enterprises.

That Court upheld the statute in question and the case was appealed to this Court where the judgment was affirmed in a most exhaustive opinion written by Mr. Chief Justice Hughes.

Home Building & Loan Association v. *Blaisdell*, 290 U. S. 398; 78 L. Ed. 413; 88 A. L. R. 1481.

With the citizens of the State burdened down under such a business and financial crisis the legislature of the State of

North Carolina felt compelled to adopt the public policy reflected in the statute in question. Without the adoption of such a course the citizens of the State would have been plunged deeper into chaos.

In the *Blaisdell* case, *supra*, this Court said:

> "Not only is the constitutional provision qualified by the measure of control which the State retains over remedial processes, but the State also continues to possess authority to safeguard the vital interests of its people. It does not matter that legislation appropriate to that end 'has the result of modifying or abrogating contracts already in effect.' Stephenson v. Binford, 287 U. S. 251, 276, 77 L. Ed. 288, 301, 53 S. Ct. 181, 87 A. L. R. 721. Not only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order. The policy of protecting contracts against impairment presupposes the maintenance of a government by virtue of which contractural relations are worth while—a government which retains adequate authority to secure the peace and good order of society. This principle of harmonizing the constitutional prohibition with the necessary residuum of state power has had progressive recognition in the decisions of this Court. • • •
>
> But into all contracts, whether made between States and individuals, or between individuals only, there enter conditions which arise not out of the literal terms of the contract itself; they are superinduced by the pre-existing and higher authority of the laws of nature, of nations or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions

inherent and paramount, wherever a necessity for their execution shall occur. • • •

The question is no longer merely that of one party to a contract as against another, but of the use of reasonable means to safeguard the economic structure upon which the good of all depends. • • •"

In the recent case of *East New York Savings Bank* v. *Hahn*, Supreme Court Law Edition Advance Opinions Vol. 90, Page 9, which involved the validity of a New York Statute enacted in 1943, carrying forward a Moratorium Statute originally enacted in 1933, this Court held that statute was valid, and after reviewing the comprehensive opinion of Mr. Chief Justice Hughes in the *Blaisdell* case, *supra*, said:

"The formal mode of reasoning by means of which this 'protective power of the State', 290 U. S. at 440, 78 L. Ed. 430, S. Ct. 231, 88 A. L. R. 1481, is acknowledged is of little moment. It may be treated as an implied condition of every contract and, as such, as much part of the contract as though it were written into it, whereby the State's exercise of its power enforces, and does not impair a contract. A more candid statement is to recognize, as was said in Manigault v. Springs, supra, that the power 'which in its various ramifications is known as the police power, is an exercise of the sovereign right of the Government to protect the • • • general welfare of the people, and is paramount to any rights under contracts between individuals.' 199 U. S. at 480, 50 L. Ed. 278, 26 S. Ct. 127. Once we are in this domain of the reserve power of a State we must respect the 'wide discretion on the part of the legislature in determining what is and what is not necessary.' Ibid. So far as the constitutional issue is concerned, 'the power of the State when otherwise justified,' Marcus Brown Holding Co. v. Feldman, 256 U. S. 170, 198, 65 L. Ed. 877, 888, 41 S. Ct. 465, is not diminished because a private contract may be affected".

From the foregoing petitioner submits that the statute is valid as coming within the police power of the State, being a proper question for adoption as the public policy of the State, by its legislature.

II

There Being a Final Adjudication in the Highest Court of the State as to the Validity of the Statute, Respondent Cannot Again Prosecute the Same Action in the Federal Court.

If the Statute was valid for the purposes enacted, it was binding on both the State and Federal Courts. *Erie Railway Co.* v. *Tompkins*, 304 U. S. 63, 82 L. Ed. 1188; *Guaranty Trust Co.* v. *York*, 89 L. Ed. 1418.

On the contrary, if it was not valid, its provisions were binding on neither the State nor the Federal Courts.

If it was not valid and there was a properly constituted State Court of competent jurisdiction to hear and determine matters of the nature in question, the State could not refuse jurisdiction to the Court to try actions involving the rights of non-residents.

The law is settled by this Court that a State Court can not escape its constitutional obligations under the full faith and credit clause by the simple device of denying jurisdiction to Courts, otherwise competent. The full faith and credit clause requires the State Court, unless it is against the declared public policy of the State, to take jurisdiction of an action when its Courts have general jurisdiction of the subject matter and the parties. *Kennedy* v. *Supreme Lodge*, 252 U. S. 411, 64 L. Ed. 638; *Broderick* v. *Rosner*, 294 U. S. 629, 79 L. Ed. 1100; *McKnett* v. *St. L. & S. F. Ry. Co.*, 292 U. S. 230, 78 L. Ed. 1227.

And, the Federal District Courts, in cases which come within the Statutory requirement as to diversity of citizen-

ship, have equal jurisdiction with State Courts to try such causes.

If the act was invalid in that its effect was to impair the obligation of a contract, as respondent has at all times and in all Courts contended it was, the State Court could not refuse to try the cause, and the judgment of the highest Court of the State, as entered, was an erroneous judgment of a Court of competent jurisdiction, but one binding on all parties until reversed by this Court. *Rooker* v. *Fidelity Trust Co.*, 263 U. S. 413, 68 L. Ed. 362.

Hence, a cause of action involving the same matter between the same parties, can not be maintained in the Federal District Court so long as such State judgment is undisturbed.

The State Court adjudged that the Statute was valid in so far as it related to the State Court, and the Circuit Court of Appeals in its opinion (R. 21) held that the interpretation of the Statute by the State Court was binding on the Federal Court.

This constitutes a conclusive adjudication that the Act is binding in so far as it relates to State Courts. We think this answers the question that the action can not be maintained in the Federal Court for the reason that since it has been judicially determined by a Court of competent jurisdiction that the State Court does not have jurisdiction to try the causes, the Federal Court, under the authority of *Erie R. R.* v. *Tompkins* and *Trust Company* v. *York, supra,* is likewise without authority to maintain the action.

Petitioner submits that there is another reason why the statute is not invalid. It will be noted that the statute precludes the obtaining of deficiency judgments after foreclosure of mortgages and deeds of trust securing purchase money notes on real estate.

The Courts of North Carolina and the Federal District Court were open to respondent to proceed against petitioner on his notes before foreclosure was had. He, therefore, had a remedy left to him which he could have pursued if he had followed that course rather than foreclosed first.

> "If a particular form of proceeding is prohibited, and another is left, or is provided, which affords an effective and reasonable mode of enforcing the right, the obligation of the contract is not impaired."
>
> *Tennessee* v. *Sneed*, 96 U. S. 69, 24 L. Ed. 610;
> See also: *Newark Savings Institute* v. *Furman*, 33 N. J. Equity 436;
> *Parker Brothers* v. *Fagan*, 68 Fed. (2) 616;
> *Page* v. *Ford*, 65 Oregon 450, 45 L. R. A. (N. S.) 247, 131 Pacific 1013.

The Circuit Court of Appeals in its opinion (R. 20), while holding that the interpretation of the Statute, as construed by the State Court, was binding on that Court, held that respondent could maintain his action in the Federal Court, on the ground that a State Statute could not limit or take away the jurisdiction of the Federal District Court. In support of this position the Court cited four cases, namely: *Suydan* v. *Broadnax*, 14 Pet. 67, 10 L. Ed. 357; *Union Bank* v. *Vaiden*, 18 Howard 506, 15 L. Ed. 472; *Railway Co.* v. *Whettan*, 13 Wallace 270, 20 L. Ed. 571; *David Lupton Sons* v. *Automobile Club*, 225 U. S. 489, 32 Sup. Ct. 711, 56 L. Ed. 1177.

In the *Suydan* case a New York plaintiff sued an administrator in Alabama on a note dated and payable in New York. The Act of the Assembly of Alabama provided that the estate of a deceased person which is declared to be insolvent should be distributed by the executors or administrators according to the provisions of the Statute, among creditors, and that no suit or action should be commenced

or sustained against any executor or administrator after the estate of the deceased had been represented as insolvent except in certain cases, not of the description of that on which the suit was brought. This Court held that the constitutional and legal rights of a citizen of the United States to sue in the Courts of the United States would not permit the suit of the plaintiff to be abated simply upon a judicial decision of the insolvency of the estate.

To the same effect is the case of *Union Bank* v. *Vaiden*, 18 Howard 506, 15 L. Ed. 472.

The case of *Railway Co.* v. *Whettan*, 13 Wallace 270, 20 L. Ed. 571, involved the validity of a Statute of Wisconsin permitting damages in death cases, with the proviso that the action should be brought for a death caused in that State in some court established by the constitution and laws of that State. This Court held that the proviso was unconstitutional as a State has no authority to give its courts exclusive jurisdiction over the Federal Courts when the Federal Courts otherwise would have jurisdiction.

The case of *David Lupton Sons* v. *Automobile Club*, 225 U. S. 489, 32 Sup. Ct. 711, 56 L. Ed. 1177, involved the construction of a New York Statute which carried a provision to the effect that no foreign corporation doing business in New York should maintain any action in that State upon any contract made by it in the State unless it had secured a certificate showing its compliance with the requirements of the Statute. The Court of Appeals of the State of New York had construed the Statute as not rendering absolutely void contracts made by non-complying corporations. This Court held that since the New York Court had construed the Statute to hold that contracts made by corporations under such circumstances were not void, but that the only penalty against corporations which violated the statutory provisions, and did business in the State without domestication, was the

loss of the privilege of maintaining a suit in the State Courts, that that did not deprive the corporation of the right to maintain the action in the Federal Court.

The object of the Statute was to penalize foreign corporations for doing business in the State without complying with the domestication Statute. The suit did not involve any question of the right of an outsider, who was not engaged in transacting business within the State, to come into the State and maintain an action under the full faith and credit clause of the United States Constitution, as in the instant case. There the contract was made in New York—the misconduct of transacting business without domestication was within the State and the suit was instituted in the Federal Court in the State. Under such facts it was held that the State Court could withhold from such party the use of its courts.

Regardless, however, of the holdings of the Court in those cases, we think the question is put at rest by the recent cases of *Erie Railway* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, and *Guaranty Trust Co.* v. *Grace W. York*, 89 L. Ed. 1418.

If the judgment of the Circuit Court of Appeals be upheld, it would mean:

(a) A citizen of North Carolina does not have the same right as a non-resident citizen.

(b) A non-resident whose claim amounts to less than $3,000.00 is deprived of any right and is placed in the same position as a resident of this State.

(c) Only a non-resident who has a claim in excess of $3,000.00 would have any right in Court.

This would be counter to what is said in the case of *Guaranty Trust Company* v. *Grace W. York, supra*, to wit:

"The operation of a double system of conflicting laws in the same State is plainly hostile to the reign of law.

> Certainly the fortuitous circumstance of residence out of the State of one of the parties to a litigation ought not to give rise to a discrimination against others equally concerned but locally resident".

It has been judicially determined that an action can not be maintained in the State Court, and since the Federal Court, under the decisions last above referred to, is without jurisdiction when jurisdiction is taken from the State Courts, the Circuit Court of Appeals, we submit, was in error and its judgment should be reversed.

Conclusion

The judgment below should be reversed.

Respectfully submitted,

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APPENDIX

Chapter 36, Public Laws of North Carolina 1933, G. S. North Carolina 1943, Section 45-36

"DEFICIENCY JUDGMENTS ABOLISHED WHERE MORTGAGE REPRESENTS PART OF PURCHASE PRICE

In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust executed after February 6, 1933, or where judgment or decree is given for the foreclosure of any mortgage executed after February 6, 1933, to secure payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same: Provided, further, that when said note or notes are prepared under the direction and supervision of the seller or sellers, he, it, or they shall cause a provision to be inserted in said note disclosing that it is for purchase money of real estate; in default of which the seller or sellers shall be liable to purchaser for any loss which he might sustain by reason of the failure to insert said provision as herein set out."